

**Court of Appeals, State of Michigan**

**ORDER**

Duaine Benard v City of Detroit

Docket No. 259523

LC No. 03-322397-NO

William C. Whitbeck, CJ  
Presiding Judge

Brian K. Zahra

Pat M. Donofrio  
Judges

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The Court orders that the June 13, 2006 opinion is hereby AMENDED. The opinion contained a clerical error in the third sentence on page 4 which is corrected as follows: "We ~~cannot~~ conclude that the DWSD's primary intent is to provide a necessary and indispensable service, not make profits."

In all other respects, the June 13, 2006 opinion remains unchanged.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUN 29 2006

Date

*Sandra Schultz Mengel*  
Chief Clerk

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DUAINE BENARD, Personal Representative of  
the Estate of CHRISTOPHER J. BENARD,  
Deceased,

Plaintiff-Appellant,

v

CITY OF DETROIT, CHARLES EASTER, and  
JUAN HUIZAR,

Defendants-Appellees,

and

PATRICK C. WHEELER,

Defendant.

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UNPUBLISHED  
June 13, 2006

No. 259523  
Wayne Circuit Court  
LC No. 03-322397-NO

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Plaintiff Duaine Benard, personal representative of the estate of Christopher Benard, deceased, appeals as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(7) in favor of defendants the City of Detroit and Detroit Water and Sewerage Department (DWSD) employees, Charles Easter and Juan Huizar. We affirm.

I. Basic Facts And Procedural History

In December 2000, Flow Rite Sewer Services, Inc. (Flow Rite) hired Christopher Benard as an independent contractor. A homeowner had hired Flow Rite to perform a sewer repair job after the DWSD determined that private pipes had caused problems in that system, not the public drain works. Bob Trotter, the owner of Flow Rite, did not, however, have the proper license to secure a permit for the necessary work. To circumvent this problem, Trotter arranged to use Patrick C. Wheeler's license and deceive the City of Detroit to obtain the proper permit.

When Flow Rite began the project, it immediately encountered a reoccurring problem with water accumulating in the excavation. Flow Rite attempted to pump out the water, but it continued to accumulate. On December 12, 2000, Flow Rite contacted DWSD to inform them of

the water accumulation problem and a possible break in one of the City's sewer mains. DWSD subsequently sent employee, Charles Easter, to conduct an investigation. When Easter arrived at the site, no one from Flow Rite was working. However, Easter observed a private excavating machine and an improperly shored excavation. He decided a supervisor should also investigate. The next day, DWSD Supervisor Juan Huizar was asked to visit the excavation site. Although there are there are conflicting accounts as to whether Huizar ever visited the site, Huizar explained at his deposition that, if he had gone, he would simply have advised the homeowner to retain private help.

On December 21, 2000, Christopher Benard was working in the improperly shored excavation. The walls collapsed, trapping him. A piece of heavy machinery sitting on the edge of the excavation then fell in, striking and killing Benard. A post-accident investigation revealed many Michigan Occupational Safety and Health Act (MIOSHA) violations.

On July 8, 2003, Duaine Benard, as personal representative of Christopher Benard's estate, filed suit, alleging negligence against the City of Detroit and gross negligence against Easter and Huizar. Plaintiff previously filed suit against Flow Rite and owner Bob Trotter, which litigation ended in a \$1 million settlement agreement.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that they were immune from tort liability as provided in the governmental immunity act.<sup>1</sup> The City of Detroit asserted that, as a governmental entity performing a governmental function, not a proprietary function, DWSD was immune from liability. Easter and Huizar argued that they were entitled to individual immunity because their actions were neither grossly negligent nor the proximate cause of the accident. The trial court agreed and granted defendants summary disposition.

## II. Summary Disposition

### A. Standard Of Review

Duaine Benard argues that the trial court erred when granting summary disposition to the City of Detroit because there was sufficient evidence to establish that the DWSD was performing a proprietary function and, as such, could not claim governmental immunity. Duaine Benard also contends that the trial court erred in granting Easter and Huizar's motion for summary disposition because their conduct was grossly negligent and the proximate cause of Christopher Benard's death.

When deciding a motion for summary disposition under MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in plaintiff's favor.<sup>2</sup> We review de novo the trial court's grant of

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<sup>1</sup> MCL 691.1401 *et seq.*

<sup>2</sup> *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999).

summary disposition.<sup>3</sup> The applicability of governmental immunity is also a question of law that is reviewed de novo on appeal.<sup>4</sup>

## B. Governmental Agency Immunity

As a general principle, a governmental agency is immune from tort liability if it is engaged in a governmental function.<sup>5</sup> One exception to this general principle is set forth in MCL 691.1413, which provides:

The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted *primarily* for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees. [Emphasis added.]

Duaine Benard asserts that the DWSD's primary purpose was to make a profit. In support of this claim, he offers evidence showing that DWSD made millions of dollars in profit for the fiscal year ending July 1, 2001. Further, he also proffers the argument that DWSD supplies its services to 125 communities around Detroit, supplying approximately 43 percent of the state's population with water and sewerage service. He claims that the only reason to offer this service beyond Detroit's borders is to realize a profit.

The mere existence of a profit does not make an activity a proprietary function. Consistent financial losses or consistently generating a profit is not conclusive evidence of a pecuniary purpose.<sup>6</sup> But the existence of a profit is relevant to a determination of the governmental agency's intent.<sup>7</sup> The question is not one of dollars and cents, but rather is a question of objective and intention. One way to determine intent is to take into account where generated profits are deposited and how they are subsequently spent.<sup>8</sup> Evidence that the revenue goes back into operating the activity could indicate that there was no intention to produce a pecuniary profit.<sup>9</sup>

On the record before us, we reject Duaine Benard's argument that the DWSD exists primarily to make a pecuniary profit. A city's act of supplying its residents and surrounding communities with water and sewerage services is a most fundamental type of governmental

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<sup>3</sup> *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

<sup>4</sup> *Baker v Waste Mgt of Mich, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

<sup>5</sup> MCL 691.1407(1).

<sup>6</sup> *Hyde v Univ Of Mich Regents*, 426 Mich 223, 258; 393 NW2d 847 (1986).

<sup>7</sup> *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 97-98; 494 NW2d 791 (1992).

<sup>8</sup> *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998).

<sup>9</sup> *Hyde, supra* at 259.

function. According to MCL 123.141(3), when selling water “the retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) shall not exceed the actual cost of providing the service.” Thus, the amount charged is statutorily controlled. And when profits are made, they are put into a fund reserved for helping maintain services and keeping costs reasonable for customers.<sup>10</sup> We cannot conclude that the DWSD’s *primary* intent is to provide a necessary and indispensable service, not make profits.<sup>11</sup> The DWSD was therefore entitled to governmental immunity for the claims against it, and we affirm the trial court’s grant of summary disposition.

### C. Governmental Employee Immunity

A government employee is immune from tort liability if, while performing a governmental function, his “conduct does not amount to gross negligence that is the proximate cause of the injury or damage.”<sup>12</sup> Gross negligence is a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks.<sup>13</sup> It is conduct so reckless that it demonstrates a substantial lack of concern for whether an injury results.<sup>14</sup>

We conclude that Duaine Benard failed to offer evidence of conduct that amounted to gross negligence. All of the dangerous and unsafe conditions at issue were created by the failure of Flow Rite to properly secure and make safe the excavation site. Flow Rite was primarily responsible for the work being done at the site and was responsible for the safety of its employees. The DWSD only played a secondary role in the situation. Its employees simply investigated the site to make sure that private plumbing lines and not public lines were creating a problem. The problem was determined not to be a public utility one and should have been handled by the private contractor.

Moreover, even if we were to agree that there was a question of fact regarding gross negligence, summary disposition was still properly granted. The employees’ actions were not the proximate cause of the decedent’s accident. Gross negligence of a government employee, which subjects him to liability, must be the one most immediate, efficient, and direct cause preceding the injury.<sup>15</sup> The walls of the excavation were not properly secured or shored, and the accident in this case was immediately and directly caused by the collapse of the excavation hole, which was Flow Rite’s responsibility to make safe. Because neither the DWSD nor its

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<sup>10</sup> *Davis v Detroit*, 269 Mich App 376, 379; 711 NW2d 462 (2006), citing Detroit Charter § 7-1503.

<sup>11</sup> *Davis*, *supra* at 379 (specifically concluding that “operation of the water department is not a proprietary activity.”).

<sup>12</sup> MCL 691.1407(2).

<sup>13</sup> *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004).

<sup>14</sup> *Id.*

<sup>15</sup> *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000).

employees were the proximate cause of the accident, they could not as matter of law be held liable. Summary disposition was appropriately granted.

Affirmed.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Pat M. Donofrio